ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 10554

MCI Communications Corporation and British Telecommunications plc Request for Approval to Transfer Control	)))	**GN Docket No. 96-245**

TO: The Commission

COMMENTS OF DEUTSCHE TELEKOM AG

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Dated: January 24, 1997

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SUMMARY

Deutsche Telekom, AG (Deutsche Telekom) continues to urge, as it did in the Foreign Carrier Entry proceeding, that the Commission should not employ an effective competitive opportunities (ECO) test. Deutsche Telekom's objection is based on its experience in Germany. Unlike the U.S., Germany does not treat differently foreigners who wish to invest in telecommunications, but instead affords foreigners exactly the same opportunities to invest in telecommunications that Germans receive. The U.S. should do the same. In the event that the Commission does not agree, Deutsche Telekom hereby submits its comments on the application of MCI Communications Corp. (MCI) and British Telecommunications plc (BT) for FCC approval to merge their companies.

Deutsche Telekom has three interests in this proceeding: (1) to assure that Deutsche Telekom and other carriers will obtain non-discriminatory access to international bottleneck facilities controlled by BT; (2) to assure that Deutsche Telekom will face fair competition with BT/MCI, which upon merger will be the first vertically integrated and consolidated transnational carrier controlling international facilities on more than one continent; and (3) to assure that Deutsche Telekom will receive even-handed treatment when the FCC reviews the openness of the German market.

If the FCC persists with its ECO test, Deutsche Telekom urges that the Commission settle on the de jure portion of the ECO test as the only feasible way to administer such a test. Indeed, even the BT/MCI Application in this proceeding downplays BT's still enormous market power and instead focuses on de jure measures of openness in the U.K. Given BT's market power, the FCC must resort to a de jure standard in order to certify the

U.K. market as open. The strength of a de jure approach and weakness of a de facto standard is highlighted by the Commission's recent Cable & Wireless, Inc. order which used a de jure measure to resolve a question of de facto market power.

If the FCC applies a de jure standard to BT, it must do the same when reviewing the openness of the German market. Therefore, if the Commission uses the ECO test to certify the U.K. market as open, it must subsequently so certify the German market.

Regardless of the standard employed, it is clear that BT/MCI will have enormous market power and control over bottleneck facilities on international routes. Deutsche Telekom therefore urges certain safeguards as a condition to any approval of the proposed merger: structural and accounting separations; clear non-discrimination requirements; dominant treatment on the U.S. to U.K. route; continued reporting requirements; and requirement of confidential treatment for commercially sensitive information.

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Deutsche Telekom, AG (Deutsche Telekom) hereby submits its comments on the application of MCI Communications Corp. (MCI) and British Telecommunications plc (BT) for Commission approval to merge their companies. As explained below, the proposed BT/MCI merger raises a number of significant competitive concerns. If the Commission decides to grant approval, Deutsche Telekom urges that certain conditions be imposed on the transaction to address these concerns.

I. INTRODUCTION AND INTEREST OF DEUTSCHE TELEKOM

As the Commission is well aware, the proposed merger would join together the second largest U.S. long distance carrier — MCI — and the dominant British carrier — BT. It would create the first vertically integrated and geographically far-flung corporate telecommunications structure with a dominant position in the domestic United Kingdom (U.K.) market and on the U.K.-U.S. international route. Unless appropriate conditions are imposed, the new entity will be capable of leveraging its U.K. dominance in the international telecommunications market, favoring its consolidated, internal operations over those of its competitors when providing bottleneck facilities and services, and exploiting the potentially asymmetric treatment of competitors by national authorities.

Deutsche Telekom has three interests in this proceeding. First, Deutsche Telekom wants to assure non-discriminatory access to international and (insofar they are required for termination of international calls) domestic U.K. bottleneck facilities controlled by BT. Among other things, BT controls the U.K. head-end of international cable facilities, including back-haul facilities, and over 90% of the local loop market in the U.K. where it is not required to grant truly equal access to its network. Therefore, any BT/MCI merger will heighten the already existing need for competitive safeguards to permit non-discriminatory access to BT's facilities.

Second, with the BT/MCI merger, Deutsche Telekom will face competition in all currently relevant markets by the new amalgam of a dominant UK and a large U.S. carrier. While ready to take on this competition, Deutsche Telekom wants to assure fair competition. Deutsche Telekom competes — in Germany, Europe and globally — with both BT and MCI. For example, in Germany BT will be a major competitor through its partnership with Viag, a large German conglomerate with an existing telecommunications network. Furthermore, Deutsche Telekom and other European carriers, including joint ventures of U.S.-based companies, now face the prospect of a unified BT/MCI pan-European operation. Globally, Deutsche Telekom's international joint venture with France Telecom and Sprint — Global One — competes with Concert, the joint venture of BT and MCI. If the currently separate activities of BT, MCI, and Concert are folded into a merged BT/MCI company, this new entity would have the ability to avoid international regulation and accounting rate regimes. This results from the fact that the traditional regulatory system governing transnational common carrier services deals with contractual relations between carriers — the so-called correspondent carriers — of two different countries. While the BT/MCI company may escape international regulation, the

principals of Global One would still be subject to very strict FCC, Department of Justice and European Commission requirements. To prevent Deutsche Telekom and Global One from being placed at a competitive disadvantage — in other words, from being subjected to regulatory restrictions and requirements that are not similarly imposed on the new BT/MCI entity — structural separations and other competitive safeguards should be imposed as a condition of Commission approval.

Third, the FCC's review of the BT/MCI merger will set a precedent for the Commission's review of the German market in connection not only with the lifting of existing restrictions imposed on Deutsche Telekom's investment in Sprint[1] but also with potential other future Deutsche Telekom investments in the U.S. market. Because the Commission no doubt will strive to act even-handedly and apply the same standards to all foreign ownership questions, Deutsche Telekom demonstrates below why, if the Commission determines that British regulatory conditions are adequate to warrant approval of the transaction, it must also do so with regard to Germany. Germany will be fully open to public wireline telecommunications competition on January 1, 1998 in the local loop, domestic long distance and international markets. Deutsche Telekom will be subject to across-the-board equal access, dialing parity and number portability requirements. Currently, neither the U.K. nor the U.S. can claim all of these. Further, the German Ministry of Posts and Telecommunications (MPT) issued licenses to Deutsche Telekom's competitors in December 1996 — six months ahead of schedule — thereby giving the new entrants a full year to prepare for full-fledged competition on January

[1] Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended, 11 FCC Rcd 1850 (1996) ("Sprint Order").

1, 1998. And finally, the German wireless telecommunications market has been open to foreign investment since its inception in 1989, with a penetration of foreign ownership (especially by U.S. companies) that is unmatched even in this country. If the FCC grants the BT/MCI application, it will be constrained in the future to grant applications of a similar kind — including an application by Sprint to remove the conditions placed in the Sprint declaratory ruling that are tied to the progress of liberalization in Germany.[2]

II. FOREIGN OWNERSHIP LIMITATIONS, WHICH GERMANY DECLINED TO INTRODUCE IN 1996, SHOULD BE TREATED WITH EXTREME DISFAVOR

As more fully developed in its comments in the Commission's Foreign Carrier Entry rulemaking, Deutsche Telekom reiterates its fundamental position on the U.S. foreign ownership restrictions.[3] Protecting U.S. consumers against anticompetitive effects of foreign investments is one thing (and can be accomplished through the use of proven safeguards); blocking foreign investment because the investor's home market does not live up to the Commission's expectation is quite another.

Economists agree that investment restrictions deprive an economy and a given market sector of desired funds and may retard the development of new market structures and innovative services, thereby harming competition and restricting the choices available to consumers. Although the Foreign Carrier Entry Order does not categorically block foreign investment, it

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[2] See id.

[3] Comments of Deutsche Telekom at 24, Market Entry and Regulation of Foreign-affiliated Entities, 11 FCC Rcd 3873, 3877 (1995)("Foreign Carrier Entry Order"), recon. pending.

does exert a significant chilling effect on foreign investment in the United States telecommunications markets, as the investment community will readily attest.

In this context, it is worth noting that Germany's telecommunications market has always been open to foreign investors to exactly the same degree that it has been open to domestic German investors.[4] In line with this tradition, the new German telecommunications law opening wireline telecommunications to competition does not contain any provision that would restrict foreign investments. Deutsche Telekom has always been opposed to foreign entry restrictions. Therefore, during the preparation of this law, Deutsche Telekom did not lobby for including a restrictive provision even though it might have slowed the wave of foreign competitors, including U.S. interests, currently entering the German market. If Germany had enacted restrictions based on reciprocity (similar to those imposed by the Commission's Foreign Carrier Entry Order), certain U.S. investments in Germany may have been impaired or deterred altogether as a result of the lack in openness and competitive development of the U.S. market, e.g., the local market. This discrepancy may become even more evident when the German market becomes fully open on January 1, 1998.

III. AS THE BT/MCI APPLICATION DEMONSTRATES, THE FCC'S EFFECTIVE COMPETITIVE OPPORTUNITIES TEST SHOULD FOCUS ON WHETHER DE JURE RESTRICTIONS EXIST IN THE PERTINENT FOREIGN MARKET

When determining whether a foreign carrier investment is in the public interest the Commission applies, among other things, the "effective competitive opportunities" (ECO) test.

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[4] U.S. carriers have already made significant investments in the German market. If, up until now, no foreign investment has been possible in the public wireline market, this has not been because of any desire to exclude foreigners as such. Rather, a generally applicable public monopoly in this market did not allow any private companies to be involved, regardless of whether they were German or foreign.

The Commission will examine first the legal, or de jure, ability of U.S. carriers to enter the foreign market. If no explicit legal restrictions on entry exist, then the Commission will determine whether U.S. carriers have the practical or de facto ability to enter.[5]

Deutsche Telekom suggests that, if the Commission applies the ECO test, it should restrict itself to an examination of the de jure openness of the foreign market. Interestingly, the BT/MCI Application focuses on a de jure standard of openness but, at the same time, blithely downplays the lack of significant competition and the continued enormous market power of BT. In light of the existing shortcomings in actual and effective competition in the U.K. market, the FCC would have to settle on a de jure examination in order to approve the BT/MCI merger.

For example, as to the de facto situation in the U.K., BT and MCI proclaim that "there has been competition in the U.K. local services market since 1986" (BT/MCI Application at 28) and review in great detail BT's local loop competitors (id. at 29-37). However, notwithstanding thirteen years of competition and numerous well-financed entrants, BT still has a near-monopoly market share of the local loop (91% of local call and 94% of exchange-line revenues). Id. at 28 n.48.[6] De facto competition is also lacking in the market of facilities-based international telecommunications services. In fact, only two months ago, i.e., thirteen years after the beginning of liberalization in the U.K., was full competition introduced in this market. The surprising dominance of BT in the U.K. market even today is partly the consequence of the

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[5] Foreign Carrier Entry Order, 11 FCC Rcd 3873, 3892.

[6] BT's near-monopoly position is partially the result of a flaw in the de jure situation, i.e., the equal access regime. Customers are discouraged from switching carriers because of a lack of full number portability. Customers wishing to switch must employ a form of dial-around that BT calls "indirect access." BT/MCI Application at 29.

U.K. regulator's decision to open up the market gradually. In contrast to the U.K.'s gradual approach, Germany has opened its market in all sectors to immediate full competition effective on January 1, 1998. Deutsche Telekom will then face competition on all fronts and not in the form of a cozy duopoly.

BT's dominance in the control of bottleneck international facilities is highlighted by the specific case of the transatlantic cable TAT 12/13, which BT manages at the Eastern end. The capacity of this key submarine cable is nearly exhausted because the operator has experienced a run on capacity shortly after the announcement of its merger with MCI. In addition to being the major capacity subscriber, BT together with MCI holds a dominant ownership position of at least 35% of the cable, with the remainder of ownership widely dispersed among other carriers. Deutsche Telekom, FT and Sprint together only hold about 10%. TAT 12/13 is an essential international facility because it is the most cost-effective submarine cable between the U.S. and Europe and is configured in a ring, thereby providing redundancy and rapid recovery. These factors make it very attractive to the valued corporate clients. The TAT 12/13 cable is also a key element for the continued rapid roll-out of internet services. In fact, one reason for the capacity strain on the cable is the enormous increase in demand from Internet service providers. BT/MCI would be in a position to use its dominant position on this bottleneck facility to discriminate against competitors and thereby, for example, to hinder their Internet plans. The merged company could derive competitive advantages from combining the ownership and acting as one company at both ends of the cable and thereby becoming capable of offering one stop shopping in the transatlantic telecommunications market.

If the Commission follows through with its interpretations indicated in its Sprint Order[7], and finds that the U.K. already provides effective competitive opportunities, notwithstanding BT's ongoing control of bottleneck facilities, it would demonstrate that the ECO test is at bottom a de jure test and does not really assess "effective" competitive opportunities in markets. Deutsche Telekom does not oppose, and indeed would welcome, such a conclusion. In spite of its increased resources and highly qualified staff, the Commission is not in a position to assess fully and accurately the state of "effective" competition in the U.K., any more than OFTEL would be expected to opine on whether there is "effective" competition in the U.S. Such an analysis of a domestic foreign market is much too complex to be carried out by an offshore regulator lacking jurisdiction over and expertise in the foreign market.

The de jure nature of the ECO test is underscored by the FCC's recent Cable & Wireless, Inc. (CWI) decision.[8] In line with its Foreign Carrier Entry Order, the Commission declined to apply the ECO test because it found Mercury, CWI's U.K. affiliate, not to possess market power on the U.K.-U.S. route.[9] In the same decision, the Commission lifted its 1994 classification of CWI as a "dominant" carrier. The intriguing part of this decision is not so much the result as the reasoning. The Commission relied substantially on a determination that

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[7] Sprint Order, 11 FCC Rcd at 1860. In the Sprint Order, the Commission rejected Sprint's showing that BT retains substantial market power in the UK and the ability to use this power to favor MCI at the expense of other carriers and relied on a de jure standard.

[8] In the Matter of Cable & Wireless, Inc. Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide Facilities-based Service between the United States and the United Kingdom; Petition for Non-Dominant Status on International Private Line Routes, (Int'l. Bur.) DA 96-2007, November 29, 1996 ("Cable & Wireless, Inc. Order"). FCC 96-___.

[9] Id.

the U.K. regulator had just announced its intention to issue additional international licenses, which, if issued, would result in Mercury no longer controlling bottleneck services or facilities[10], i.e., not being a carrier with market power. On balance, a de jure showing (the issuance of licenses) disposed of the market power issue. In other words, the Commission focused on the absence of legal restrictions on the ability to compete.

Once again, Deutsche Telekom does not oppose this approach. The point is that the FCC — with all due respect — really has not the legitimacy and lacks the expertise and resources needed to adequately assess the de facto status of competition in foreign markets. The current difficulties the U.S. regulators have in establishing the relevant factual elements for decisions on local and interexchange competition are unquestionably multiplied when foreign market conditions are investigated and evaluated. The FCC has always had a legitimate interest in ensuring that the international actions of carriers in foreign markets — whether those markets are characterized by monopoly, duopoly, or "effective" competitive opportunities — do not result in discrimination against U.S. companies on U.S. international routes. The U.S. international route should therefore be the subject of the FCC inquiry, not the foreign market. To this end, the FCC properly developed over many years of experience its international settlements policy, including non-discrimination, proportionate return and "no special concessions" requirements, to ensure non-discrimination on U.S. international routes. By purporting to regulate or even assess actual competition in foreign markets, however, the Commission has extended its reach beyond its grasp.

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[10] Id.

IV. IF THE FCC USES THE ECO TEST AND CERTIFIES THE U.K. MARKET AS OPEN, THEN IT MUST SUBSEQUENTLY ALSO CERTIFY THE GERMAN MARKET AS OPEN

If the FCC forges ahead with the ECO test to approve the BT/MCI merger, it must subsequently find that Germany provides effective competitive opportunities as well. As noted before, Deutsche Telekom has a direct interest in this issue because in its January 11, 1996 declaratory ruling on Deutsche Telekom's 10% investment in Sprint, the FCC expressly stated that it considers the proceeding to be ongoing until Germany has fully implemented the market-liberalizing measures to which it has committed.[11] The Commission's apparent standard is that de jure measures providing the possibility of actual competition will fulfill the ECO test. Germany fulfills any such measurement of de jure openness.

As noted above, in its most recent action the MPT, in December 1996, issued licenses for the provision of public telephone service to a number of competitors of Deutsche Telekom — a full six months ahead of the MPT's self-imposed schedule. This will provide competitors a full year to prepare for the January 1, 1998 commencement of full-scale competition. Deutsche Telekom's competitors have the right to provide international, domestic long distance and local loop service on a facilities or resale basis. This compares favorably with the U.K. which, as noted above, only recently abandoned its duopoly in international services. Currently in place as well are all of the other elements of the Commission's ECO test, such as a forward-looking interconnection regime, including truly equal access and number portability, competitive safeguards and a regulatory framework. Deutsche Telekom concludes that where the FCC uses

[11] Sprint Order 11 FCC Rcd at 1871.

the ECO test to approve the BT/MCI application, evenhanded application of standards requires that Germany be deemed to provide effective competitive opportunities as well.

V. IF THE FCC APPROVES THE BT/MCI MERGER IT MUST IMPOSE COMPETITIVE SAFEGUARDS AGAINST THE POTENTIAL ABUSE OF A DOMINANT POSITION ON CERTAIN INTERNATIONAL ROUTES

Regardless of whether the U.K. market is open, the merged BT/MCI entity would possess market power and the ability to discriminate against competitors in national, continental and global markets. BT's acquisition of MCI and the transfer of control of MCI's international activities to BT raise unique concerns not encountered at lower levels of ownership where there is no transfer of control. By way of comparison, a 100% BT/MCI merger raises greater competition concerns than did Deutsche Telekom's and FT's respective 10% investments in Sprint and cooperation in Global One, if only because the incentive for BT to favor MCI (i.e., itself) in the provision of bottleneck facilities and services is far greater than in a case of a 10% or larger minority investment.

Deutsche Telekom therefore urges the following safeguards as a condition to any approval of the proposed BT/MCI merger:

1. Structural separation of (a) domestic U.S., (b) domestic U.K., and (c) international operations;

2. Accounting separation resulting in separate books of accounts for each of the above three entities;

3. Clear non-discrimination requirements that the three entities offer third parties the same terms, conditions and rates they offer each other, including international accounting and settlement rates;

4. Dominant treatment on the U.S. - U.K. route, including requiring 214 approval for addition of new facilities on this route;

5. Continuation and enhancement of existing reporting requirements; and

6. Requirement of confidential treatment for competitively sensitive information provided by competitors to gain access to bottleneck facilities.

The rationale for these suggested safeguards is stated below.

Structural Separation, Accounting Separation, and Non-discrimination. The FCC's international settlements policy is premised on the U.S. facilities-based carrier's independence from the foreign carrier at the other end of the international route. However, where a unified U.S. and foreign carrier owns facilities at both ends of the route, requirements of proportionate return, non-discrimination, no special concessions, and the other regular FCC requirements lose their effectiveness. The FCC has two choices: (a) create a new framework to regulate unified carriers or (b) maintain the existing regulation by imposing structural and accounting separations. Creating a new regulatory regime, while possibly beneficial, may be premature and not practical for the BT/MCI Application because of notice and comment constraints. Therefore, the FCC should impose separations on BT and MCI in order to maintain the Commission's existing regulatory apparatus.

This is especially true for accounting and settlement rates. Because BT and MCI will own facilities on both ends of routes, the companies could undercut competitors by charging each other lower termination fees, thereby making their products less expensive. MCI's existing "no special concessions" requirement would not prevent this from occurring because the new Concert, which presumably would hold MCI's existing Section 214 authorizations, would not

be granting a "special concession" to a "foreign carrier" (as is currently prohibited), but instead would simply be making intra-company transfers. The FCC therefore needs to make clear, as a matter of law and corporate structure, that MCI and BT are separate carriers for regulatory purposes, and that the "no special concessions" condition applies to MCI's dealings with BT.

To be certain, all international carriers should move to cost-based settlement fees, rather than continue with the outmoded accounting rate system.[12] However, the FCC would permit an unfair advantage (and the unraveling of its regulation) if BT/MCI were to abandon accounting rates while other carriers were required to maintain them.

Similarly, a unified BT and MCI would have both the motive and opportunity to cross-subsidize and discriminate. It should be emphasized that Deutsche Telekom's concern is not theoretical. A global carrier that is able to self-provide the necessary elements for one-stop shopping offerings has a significant advantage over competitors that must rely on outside provisioning from the competing global carrier. Without separate corporate entities and books of accounts, it would not be clear whether the price, terms and conditions that BT/MCI offers "itself" is different from what it offers to others. The local U.K. safeguards proffered by the BT/MCI Application (p.44-49) will not suffice because of the global dimension of a unified BT/MCI combination. Further, the U.K. interconnection regime may undergo significant change in the near future resulting in higher charges, giving BT greater ability to discriminate.

Dominant treatment. The Commission previously did not classify MCI as dominant on the U.S. to U.K. route specifically because there was no transfer of control in the initial

[12] DT currently registers one of the lowest accounting rates that U.S. carriers have with a correspondent foreign carrier.

investment.[13] Now, of course, control would be transferred. Dominant treatment is necessary because of BT's near-monopoly control of the U.K. local loop, the combined BT/MCI market power on the U.S. to U.K. route and BT/MCI's control of international bottleneck facilities on the same route.

Section 214 approval of new circuits on the U.S. to U.K. route is necessary to ensure that BT does not favor itself or MCI/Concert in the provisioning of circuits on TAT 12/13, including back-haul facilities, or other international facilities that BT owns or manages. For example, BT/MCI may be able to effectively blunt the competitive impact of issuance of the U.K.'s new international licenses by anti-competitive facilities management.

Reporting requirements and confidentiality. There would be an even greater need for FCC reporting requirements, with a fully merged BT/MCI, than when BT initially invested in MCI. Similarly, given that the BT/MCI control of bottleneck facilities will undoubtedly extend beyond the terms of BT's U.K. license, the FCC should impose broad confidentiality requirements protecting customer and competitor proprietary information.

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[13] MCI Communications Corporation, British Telecommunications plc Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended, 9 FCC Rcd 3960, 3966 (1994).

CONCLUSION

When applying its ECO test the Commission ought to limit itself to de jure review of the openness of the foreign market. Practicality, consistency and comity require the Commission to abstain from policing a foreign market. If the Commission finds the UK market to be open de jure, it will have to do the same with the German market. In any event, the Commission should focus on safeguards to protect US consumers on US international routes. BT's control of bottleneck facilities on international routes and the ability of a combined BT/MCI to circumvent accounting rates require the institution of strict competitive safeguards.

Respectfully submitted,

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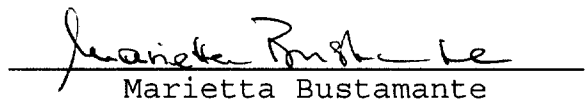
CERTIFICATE OF SERVICE

I, Marietta Bustamante, a legal secretary with the law firm of Mayer, Brown & Platt, hereby certify that on this 24th day of January, 1997, a copy of the foregoing "Comments of Deutsche Telekom AG" was delivered by hand to the parties listed below.



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